gous to that of common carriers with respect to their duties to the public.[12]

Then, reverting to the text submitted above, the lease for 99 years would here appear to be clearly against public policy, for the *scope of the service* was thereby materially limited, since the contracting company could not furnish the local companies with the connections which they could secure by supplementary contracts with other long distance companies. Such conclusion is supported by numerous authorities.[13]

The whole question arose in an unusual way, which is worthy of notice. The complainant company asked for an injunction to restrain the respondent company from interfering with this 99 year lease of complainant's, and from effecting breaches of this contract by the local companies. The relief was sought on the basis of the old doctrine of *Lumley* v. *Gye*.[14] The Court, however, held that in issuing an injunction to prevent a breach of contract, it necessarily devolved upon the Court to inquire into the legality of the contract which was to be thus negatively enforced. Then, turning the tables on the complainant, they held that it had made a contract in violation of public policy and statute law, and was therefore entitled to no relief on such contract.

The whole matter being an equitable proceeding the Court was entitled to look both at the respondent's wrong, and at the standing of the complainant, and it was justified in refusing aid not only for the reason just given above, but on account of the old equitable maxim that "he who comes into equity must come with clean hands." This was a case, therefore, when the "tu quoque" argument proved wholly effective.

*W. L. MacC.*

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## Action for Libel Where Defendant Has Used a Fictitious Name.

A curious and unusual set of facts has recently presented to the King's Bench Division a perplexing question in the law of Libel.[1]

The *Sunday Chronicle* published a letter from its Paris correspondent describing a motor festival at Dieppe. In this

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[12] Hutchinson on Carriers, § 81a.

[13] *State* v. *Tel. Co.*, 47 Fed. 633 (1891); *Munn* v. *Illinois*, 94 U. S. 113 (1876); *Ohio* v. *Tel. Co.*, 36 Ohio, 296 (1880).

[14] 75 Eng. C. L. R. 216 (1853).

[1] *Jones* v. *Hulton*, L. R. (1909), ii K. B. D. 444.

letter the author in describing the crowd upon the terrace, wrote: "There is Artemus Jones with a woman who is not his wife, who must be, you know, the other thing. Who would suppose by his goings-on that he was a church-warden at Peckham?" The correspondent invented the name "Artemus Jones" and had no idea of applying his remarks to any particular person. Unfortunately, however, a man bearing the name of Artemus Jones, who neither lived at Peckham nor was a church-warden, brought an action against the proprietors of the *Sunday Chronicle,* proved that several persons had thought him to be the Artemus Jones referred to in the letter, and recovered 1750 pounds damages. The three judges who decided the case on appeal dealt chiefly with this question,—To what extent does the defendant's intention affect the question of liability? Lord Alverstone, C. J., held that the defendant's intention was entirely immaterial; Fletcher-Moulton, L. J., held that it was crucial; and Farwell, L. J., divided his attention between the questions of intent and negligence.

The question of intent in libel has been discussed in three classes of case: (1) Where the defendant intends to publish a statement concerning the plaintiff, but does not intend it to be libellous. Here it is usually held that the defendant's intention is immaterial.[2] He has made a statement intending it to apply to the plaintiff and must take the risk of the consequences of such a publication; he is in the position of a man who, intending to strike his neighbor's dog in play, inadvertently strikes it dead.

(2) Where the defendant, intending to make an innocent statement concerning the plaintiff, makes a libellous statement by mistake. Here the same considerations apply. Thus where defendant, intending to insert plaintiff's name under "Notices of Dissolution of Partnership," put it by mistake under the heading "First Meetings Under the Bankruptcy Act," the plaintiff recovered.[3] So, too, where a newspaper in reporting an arrest inadvertently interchanged the names of prisoner and prosecuting witness, the latter recovered.[4] In both classes of case it is evident that the defendant is entirely innocent of any intent to harm the plaintiff; but it must be observed that the defendant intends to involve the plaintiff in the act which he is doing, *i. e.*, he intends to make a statement concerning the plaintiff.

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[2] *Haire* v. *Wilson,* 9 B. & C. 645 (1829).

[3] *Shepheard* v. *Whitaker,* L. R. 10 C. P. 502 (1875).

[4] *Griebel* v. *Rochester Printing Co.,* 60 Hun, 319 (1891).

(3) Where the defendant has no idea of making any publication concerning the plaintiff. In this class, in which the principal case falls, the defendant not only has no intent to harm the plaintiff, but, having never heard of the plaintiff's existence, has no intent to do any act in which the plaintiff shall be involved. Can such a state of mind involve the defendant in liability to any action? Very few cases answer this question directly and in those cases which discuss the matter, the confused use of the words "intention" and "meaning" and the possibility of taking them either subjectively or objectively, make it difficult to ascertain the true opinion of the court. A few cases discuss the question of a publisher's liability to a plaintiff whose name has been innocently used by the publisher in a libellous article, but in most of these it appears that the defendant intended to level his remarks at some living person, if not at the plaintiff.[5]

*Smith* v. *Ashley*, 52 Mass. 368, seems to be a direct authority in conflict with the decision of Lord Alverstone and Lord Farwell. The Court in *Smith* v. *Ashley* held that a publisher was not liable for the publication of an article, though aimed at the plaintiff by the writer, provided the defendant thought the article a mere skit and the plaintiff's name a fictitious one. It is evident that the court was controlled by a theory of tort liability somewhat different from that which influenced Lords Alverstone and Farwell. The Court said, "If the defendant had no knowledge that the article published was libellous, he has been guilty of no wrong, and he is not responsible by law, although the plaintiff has thereby been injured." The Court in the principal case, on the other hand, takes the position that it is injury to the plaintiff, and not a wrongful act on the part of the defendant, which constitutes the real basis of liability. The modern conception of tort involves two ideas, (1) injury to the plaintiff and (2) the injury is directly due to an omission by the defendant of the performance of a duty due by him to the plaintiff. In the principal case, injury to the plaintiff is evident; it therefore becomes material to consider only the second of the above elements. Farwell, L. J., proceeds on the theory that the defendant was negligent in giving out to the world a scandalous story which might, by any possibility, injure a living person. This sets a high standard of the duty of carefulness owed by one man to his neighbors. On the other hand, in the few cases contra, it is said that a man discharges his duty to his neighbor in this matter, if he abstain from wilfully

[5] *Harrison* v. *Smith*, 20 L. T. (N. S.) 713 (*Nisi Prius*, 1869); *Hanson* v. *Globe Newspaper Co.*, 159 Mass. 293 (1893).

publishing statements meant by him to apply to one of his neighbors.[6]

Where two theories so widely divergent appear each to have a sound basis in legal philosophy, the criterion of liability must of necessity be found by an application of the dictates of common sense and convenience. Fletcher-Moulton, L. J., points out to what absurdities a logical extension of his colleagues' judgment must lead.[7] Since an action of libel will lie although no name has been used, a public speaker may bring upon himself very serious consequences by innocently introducing a hypothetical case to illustrate a point in his discourse. So a statement true of the John Smith "of and concerning" whom the defendant wrote, may give to a hundred other John Smiths a cause of action against the publisher. If it be said that by ascertaining the truth of his statement with regard to one John Smith the publisher has thereby discharged his duty of carefulness towards his neighbors, it may well be answered that this is an arbitrary rule and that, if the severe doctrine be carried out to its logical limits, a publisher should be obliged to make it plain and unquestionable which of the hundred and one John Smiths he intended. In the words of Fletcher-Moulton, L. J., "It would indeed be a calamity if our English law of defamation burdened ordinary speech or writing with such a chaos of responsibilities." The milder rule seems more in accord with common sense and convenience than the stringent rule set forth by the majority of the English Court.

*S. L.*

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## False Representations of Principal and Agent.

It seems reasonably clear that an innocent principal is liable in tort for deceit, if his agent deliberately makes false representations, or makes them in conscious ignorance of their truth or falsity, while acting within the scope of his authority. The idea underlying this doctrine appears to be that the principal cannot employ an agent and retain the benefit of his services without assuming full responsibility for the frauds of the agent as well as for his other torts.

A few cases hold that this liability of the principal need not be based upon the tort of the agent, but may be referred to the contract, as on a breach of warranty. Thus, where an agent was authorized to make material and false representa-

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[6] *Every Evening Printing Co.* v. *Butler*, 144 Fed. 916 (1906).

[7] L. R. (1909), ii K. B. D. 475.